

ORIGINAL

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JAN 26 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 93-87
RAYMOND W. CLANTON)	File No. BPH-911216MC
LOREN F. SELZNICK)	File No. BPH-911216MD
)	
For Construction Permit for a)	
New FM Station on channel 279A)	
in El Rio, California)	

To: Honorable John M. Frysiak
Administrative Law Judge

PETITION FOR LEAVE TO AMEND

Loren F. Selznick respectfully petitions for leave to amend her above-referenced application to substitute a revised cost budget and revised financial plan. See Revised Amendment, attached hereto.

1. The Revised Amendment should be granted. First, it meets the FCC's "good cause" test for post-designation amendments. See generally Erwin O'Connor Broadcasting Co., 22 FCC 2d 140-143 (Rev. Bd. 1970). It satisfies the six elements of that "good cause" test:

2. The Revised Amendment updates Selznick's pending application to report changed information concerning her proposed costs and her continued financial qualifications. See 47 CFR § 1.65(a). The Revised Amendment is involuntary.^{1/} Indeed, if

^{1/} Assuming that Selznick herein has proved her financial qualifications ab initio, a change in the budget does not constitute improper upgrading. Cf. Lynn Broadcasting, 8 FCC Rcd 6719 at note 2 (applicant's post designation change in integration effectuation plan is not improper upgrading where original show-

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Selznick were to fail to report such information, it reasonably could lead to the addition of a Rule 1.65(a) reporting issue against Selznick. ^{2/}

3. Acceptance of the Revised Amendment also would not require the addition of new issues. In fact, acceptance of the Revised Amendment will aid the resolution of the three issues that were added against Selznick last year. See discussion, infra, at ¶ 8.

4. The Revised Amendment has been diligently filed within 4 months after the Presiding Judge denied Selznick's first report of this information to the Commission. ^{3/} Cf. WCTO, Inc., 56 RR 2d 1539, 1546-50 (Rev. Bd. 1984).

5. Acceptance of the Amendment will not disrupt the hearing on the three issues added against Selznick, which is scheduled for January 12, 1994. Indeed, the Revised Amendment essentially reiterates the information submitted by Selznick in her Direct Case Written Testimony for that hearing, exchanged by hand on December 30, 1993. Clanton will not be unfairly prejudiced. ^{4/}

ing was adequate).

^{2/} See Weyburn Broadcasting L.P. v. FCC, 984 F.2d 1220 (D.C. Cir. 1993) (FM proceeding remanded for trial on issues including failure to update application as to financial plans).

^{3/} Selznick's August 30, 1993 Petition for Leave to Amend and accompanying Amendment was filed within 30 days of the change being therein reported. Hence, Selznick has complied with Section 1.65(a) of the Commission's Rules.

^{4/} Clanton will have an opportunity to review Selznick's Petition and Revised Amendment the week prior to hearing and an opportunity to file any response thereto. Moreover, Clanton will (footnote continued)

6. The "good cause" test is also met because Ms. Selznick will gain no undue advantage by acceptance of the Revised Amendment. The Revised Amendment concerns Selznick's basic qualifications only, not her comparative case. With respect to her basic qualifications, it long has been clear that an opponent such as Clanton has no vested interest in the disqualification of his competitor. See generally Azalea Corp., 31 FCC 2d 561 (1971).

7. In sum, the Commission's "good cause" test is met in these circumstances by Selznick's Revised Amendment and it should be accepted.

8. The Revised Amendment also should be accepted in this case whether the "good cause" test for post-designation amendments is technically met or not. To reject Selznick's Revised Amendment would be arbitrary and capricious for two reasons. **First**, it would depart arbitrarily from FCC precedents. The FCC long has favored an opportunity to choose between two or more competing applicants in awarding broadcast spectrum. Cf. Golden Shores Broadcasting, Inc., 2 FCC Rcd 4743 (1987) (FCC has interest in maximizing the "pool" of applicants for a new FM station). Here, the Judge's failure to accept Selznick's Revised Amendment could lead to Selznick's disqualification and, by default, the grant of Clanton's application. The Commission has recognized that, in appropriate circumstances, its statutory policies are best achieved by accepting an amendment vel non when

have an opportunity to cross-examine Ms. Selznick at the January 12, 1994 hearing session, inasmuch as Selznick will not oppose Clanton's request for her cross-examination.

to do so will remove a potentially disqualifying defect. See Anax Broadcasting, Inc., 87 FCC 2d 483, 488-89 (1981). Indeed, the Commission even has granted an applicant's **third** financial amendment when it furthered the ends of justice [see 47 USC § 154(j)] and best served the Commission's statutory mandates. See, e.g., Bison City TV 49 Partnership, 91 FCC2d 26, 30 (Rev. Bd. 1982). In this case, acceptance of the Revised Amendment will best serve the public interest by preserving a choice between applicants. Accord WCTO, Inc., supra, 56 RR 2d at 1546-50.

9. **Second**, the Judge's failure to accept Selznick's Revised Amendment would undermine the FCC's policy in requiring applicants to both tell the truth and report changes to their proposals within 30 days of their occurrences. See 47 CFR § 1.17, § 1.65(a). As detailed in her Revised Amendment (and previously in her August 1993 Amendment), Selznick changed her plans with respect to building and operating the El Rio FM station following settlement talks with Clanton. She and Clanton agreed that, in order to succeed in a more competitive FM radio environment, the El Rio station would have to be constructed and operated in a manner far different from that proposed in Selznick's 1991 application. Moreover, when settlement talks finally collapsed in the summer of 1993, Ms. Selznick consulted numerous experts to determine whether it was even worthwhile to continue to pursue the El Rio application in light of the changes in the FM radio environment. She was told that her original cost budget was unrealistic and excessive. Accordingly, Ms. Selznick concluded that she

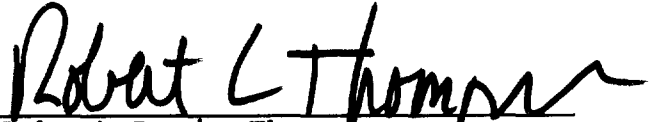
should pursue her FM application for El Rio but to report to the Commission that her plans had substantially changed with respect to the cost budget and, derivatively, with respect to her financial plan. It would be arbitrary and capricious for the Commission to disallow such changes.^{5/} See Bechtel v. FCC, D.C. Cir. No. 92-1378, decided December 17, 1993. Ms. Selznick simply would not build her proposed FM station as originally proposed because of changed circumstances in the FM radio environment. In the interest of eliminating artificialities in the FCC's comparative hearing process (see Bechtel v. FCC, supra), the FCC should accept Selznick's Revised Amendment.

^{5/} Such a change is not an unlawful "upgrading" of Selznick's application as long as she demonstrates her initial financial qualifications. Cf. Lynn Broadcasting, supra, 8 FCC Rcd at 6719 n.2 (1993) (applicant's post-designation change is not improper upgrading when original showing was adequate).

CONCLUSION

The Petition should be granted and the Revised Amendment should be ACCEPTED.

Respectfully submitted,


Robert Lewis Thompson
PEPPER & CORAZZINI
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

Counsel for Loren F. Selznick

January 6, 1994

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Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

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LOREN F. SELZNICK)	File No. BPH-911216MD
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For Construction Permit for a)	
New FM Station on channel 279A)	
in El Rio, California)	

To: Honorable John M. Frysiak
Administrative Law Judge

DECLARATION

1. My name is Joseph P. Dailey and I reside at 565 Peralta Hills Drive, Anaheim, California 92807. I make this declaration in support of the amendment to the application of Loren F. Selznick for a new FM station in El Rio, California concerning financial qualifications.

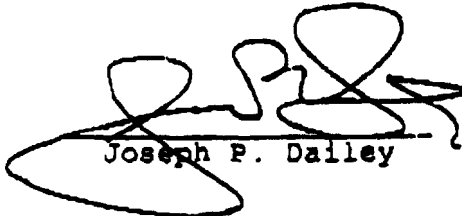
2. At the time Ms Selznick applied for the construction permit in December 1991, I gave her reasonable assurance that I would provide the funds necessary to construct the station and operate it for three months without revenue. At the time, we contemplated that the total cost would be \$360,070. Annexed to this declaration as Exhibit A is my personal financial statement as of November 30, 1991 with which Ms Selznick was familiar. Also annexed as Exhibit B is my personal financial statement as of August 27, 1993. I was and continue to be able to provide the funds originally contemplated.

3. In late July, 1993, Ms Selznick and I had a telephone conversation in which Ms Selznick told me that she had spoken with several brokers and consultants. She reported to me that she was advised that a much more streamlined approach to both construction and operations would be advisable for a start-up radio station. Specifically, Ms Selznick informed me that she was advised that the funds necessary would be less than \$110,000. With the substantially lower amount in mind, Ms Selznick also advised me that she thought she would be able to provide almost all of the funding herself. We agreed that Ms Selznick would provide as much of the funding as she could and that I would make up the difference with a loan of up to \$40,000.

4. If my funding is required, I am willing to provide a loan of up to \$40,000 for a term of 5 years at an interest rate of 12% with payments to commence one year after completion of construction of the radio station.

I swear under penalty of perjury that the foregoing is true and complete.

August 27, 1993



Joseph P. Dailey

Social Security..... 179-84-8445

Address..... 565 Peralta Hills Drive
Anaheim, California 92807

Telephone..... (714) 282-1170 (Home)
(714) 640-5426 (Office)

Occupations..... Attorney
President
RunTime Technologies, L.P.
610 Newport Center Drive, Suite 600
Newport Beach, California 92660

Peralta Hills Home (Appraised Value).....	\$1,600,000
Cash	\$218,000
Partnership Profits	\$230,864
Salary Receivable.....	\$50,000
Partnership Inventory Interest	\$150,368
RunTime Technologies Investment At Cost.....	\$420,000
Personal Property.....	\$250,000
Automobiles.....	<u>\$20,000</u>
Total.....	\$2,939,232

Mortgage Debt.....	\$975,000
Bank Loans.....	\$44,970
Notes Payable.....	\$0
Income Taxes Payable.....	\$0
Charge Accounts Payable.....	\$0
Total.....	\$1,019,970

Net Worth..... \$1,919,262

Social Security..... 179-84-8445

Address..... 565 Peralta Hills Drive
Anaheim, California 92807

Telephone..... (714) 282-1170 (Home)
(714) 640-5426 (Office)

Occupations..... Attorney
President
RunTime Technologies, L.P.
610 Newport Center Drive, Suite 600
Newport Beach, California 92660

Peralta Hills Home (Appraised Value).....	\$1,600,000
Cash	\$42,800
Partnership Profits.....	\$124,627
Salary Receivable.....	\$216,667
Notes Receivable.....	\$30,000
Partnership Inventory Interest.....	\$90,220
RunTime Technologies Investment At Cost.....	\$780,000
Personal Property.....	\$250,000
Automobiles.....	<u>\$10,000</u>
Total.....	\$3,144,314

Mortgage Debt.....	\$950,000
Bank Loans.....	\$68,921
Notes Payable.....	\$0
Income Taxes Payable.....	\$0
Charge Accounts Payable.....	\$0
Total.....	\$1,018,921

Net Worth..... \$2,125,392

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of
RAYMOND W. CLANTON
LOREN F. SELZNICK

For Construction Permit for a
New FM Station on channel 279A
in El Rio, California

)
) ORIGINAL
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)
)
) Case No. 708 715
)
)

DEPOSITION OF:

JOSEPH P. DAILEY, ESQ.

MONDAY, NOVEMBER 22, 1993

10:05 A.M.

Reported by: MARY LOU CUSHNER

C.S.R. No. 6699

CBS

1 BY MR. DANIELS:

2 Q. So after December, 1991, other than the
3 financial statements, Exhibit 1, and Exhibit 2 that
4 you provided to her, did she ask for any other
5 writings?

6 A. What kinds of writings? As I told you, we
7 did exchange drafts of this agreement with Clanton,
8 and we did exchange over the modem the spreadsheet
9 that I told you about where she was doing a financial
10 projection of the business.

11 Q. But you did say that you felt that had
12 nothing to do with the loan related to this
13 application.

14 A. You didn't qualify it by "the loan." You
15 said did she ask for any other writings.

16 Q. Correct.

17 A. Relating to the loan, no. She never asked
18 for any writings relating to the loan until August,
19 1993, and she specifically said that they weren't
20 required because I indicated I would be prepared to
21 provide them if they were.

22 Q. So did you orally express a willingness to
23 lend Ms. Selznick the money for the El Rio station?

24 A. No, I didn't express an interest; I told her
25 that I would.

1 Q. Before December, 1991, do you remember which
2 conversation you did this in and what it is that you
3 said?

4 A. We just went over that. I'll recapitulate it
5 for you. At some point in 1991, in November, 1991,
6 and I date it all by the receipt of this check from my
7 former law firm, which has nothing to do with this
8 specifically except that I remember very clearly
9 waiting for it, having received it, and then Loren and
10 I going over my balance sheet, and that's how I'm able
11 to date the conversations. Those were about the third
12 week in November.

13 Before that there was -- and it may have been
14 a week or two before that -- she told me that she was
15 getting concerned that Derrick Cephas and his group
16 would not give her the commitment that she needed to
17 file her application. It was at that point that I
18 volunteered, and I said that, "Hey, I'll be glad to do
19 it. I think it's a great deal."

20 And following that, we had another
21 conversation -- it was very shortly thereafter --
22 where she became back and basically asked me to
23 confirm what I had previously said. She said, "Are
24 you really sure you want to do this?"

25 And I said, "Absolutely." I said, "This is a

1 very good deal." And I again reviewed what I saw as
2 the economics of the transaction -- that you had an
3 opportunity to get in on the ground floor and that
4 your basic security was knowing that the market was
5 pricing these stations substantially higher than their
6 cost, and it made sense. And I confirmed that.

7 Q. And during those two conversations you've
8 just spoken of, did you discuss any of the terms?

9 A. No, we never -- we never discussed the
10 terms. I told her that I would provide the financing.

11 Q. How much was requested?

12 A. Well, at that point she had said \$350,000,
13 \$360,000, one of those two. My recollection is
14 \$350,000. She asked me at some point to sign a
15 declaration in which she said it was 360,000, but it
16 was in that range, but I'm not sure. That was the
17 number we were talking about. But she had previously
18 told me what the cost was to do this, but at this
19 point we had not talked about the financing from me.
20 She was talking about getting financing from Derrick
21 Cephas and his group.

22 And as I said, it's possible, although I'm
23 not sure, because this would have been in October,
24 1991. I know I was in New York several times because
25 we had just gotten a major decision in litigation, and

1 debt and probably precluded the acquisition of further
2 debts --

3 Q. Let's go back --

4 A. -- or they could have been very healthy and
5 very strong and would have been a means for financing
6 any additional ventures; so it really depends on the
7 circumstances.

8 Q. Let's go back to December, 1991. So at
9 that --

10 A. It's November, 1991, I believe I testified.

11 Q. Okay. So with regard to November, 1991, when
12 you had the two conversations we have been speaking of
13 with regard to the willingness or commitment, as you
14 said, to loan the money regarding the station, at that
15 time was that a firm intention to make a loan, future
16 conditions permitting?

17 A. I'm not sure what you mean by "future
18 conditions permitting." I gave an unconditional
19 commitment to finance the money and to lend her the
20 money, and there was no discussion of future
21 conditions.

22 Q. And at this time, do you have a firm
23 intention to make the loan, future conditions
24 permitting?

25 A. Again, I don't know what you mean by "future

1 conditions." She told me at some point in the summer
2 of this year, the summer of 1993, following her
3 conversation with one of the brokers that I previously
4 referred to, that the amount that she would need to
5 start the station was substantially less than
6 \$350,000, that she was told by one broker that it
7 could be under \$100,000, and another broker, I
8 believe, may have mentioned that it was probably a
9 little over \$100,000. But whatever it was, she told
10 me that she was going to put in the amended
11 application and that she would be putting in more of
12 her own equity and that she only needed \$40,000,
13 approximately, from me.

14 I said, "Fine. You've got it." I previously
15 committed to \$350,000. Basically, I was going to do
16 what was necessary to assist Loren in this project,
17 not as a charitable or personal favor but from, again,
18 the basic economics of it. I just think it's a hell
19 of a deal.

20 Q. Let me get back to -- you said it then went
21 down to approximately \$40,000. So what do you
22 understand your commitment to be today?

23 A. My commitment today is -- I understand that
24 there is a controversy, and I'm not familiar with the
25 facts or circumstances of the controversy as to

1 whether her initial application is still in place or
2 whether an amended application; so my understanding is
3 it's either \$40,000 or \$350,000, and it doesn't make
4 any difference. She wants to do it, I believe, at the
5 \$120,000, but I understand that there was an adverse
6 ruling by the administrative law judge; so I'm not
7 sure what the circumstances are.

8 Q. Do you know if her own financial situation
9 has changed since you committed to the approximate
10 \$40,000 amount?

11 A. I have no reason to believe that it has. I'm
12 not aware of any.

13 Q. Have you seen any documentation to that fact?

14 A. I've never seen any documentation. No
15 documentation is necessary under these circumstances
16 as far as I'm concerned. If it was, I would get it.
17 I certainly, you know, do a number of business deals
18 and where you have to bring the lawyers in and dot the
19 I's and cross the T's when you bring them in, but when
20 you deal with someone like this, as far as I'm
21 concerned, it's like dealing with a member of your
22 family; so it's on a different basis.

23 Q. Have you ever seen her FCC application or any
24 part of it?

25 A. I believe I saw part of it relatively

1 certainly in the range.

2 You remember I had said that I could not
3 recall whether there was a working capital component,
4 and it's clear there obviously must have been a
5 working capital component to \$350,000, and I don't
6 know what it was.

7 Q. Do you know why that period of time was
8 chosen rather than some other?

9 A. No. It was my understanding it was based on
10 what she believed was necessary.

11 Q. What do you mean by the term "reasonable
12 assurance"?

13 A. I'll be very honest with you. Those were --
14 she drafted this. I don't know why she used the
15 weasel words "I gave her reasonable assurance." I
16 never said, "I will give you reasonable assurance." I
17 said, "Hell, I'll do the deal myself." Those were the
18 words or words to that effect that I used. It wasn't
19 reasonable. It was a flat assurance. I committed to
20 give her the money. But I guess, you know, she was
21 playing lawyer here or something, she was afraid I
22 wouldn't want to -- she used this strong language, but
23 as I told you, I gave her a flat commitment.

24 Q. Did you give her reasonable assurance in
25 1991?

1 A. I told -- it was in the -- sometime around
2 the third week of November, 1991, that I told her that
3 I would provide the financing, and I guess a lawyer
4 might describe that as reasonable assurance. I didn't
5 say, "I will give you reasonable assurance." I said,
6 "I'll give you the financing."

7 Q. Prior to signing this document, did you do
8 any research into the FCC definition of the term
9 "reasonable assurance"?

10 A. I'm trying to remember when I read the
11 instructions to the FCC application that Loren faxed
12 to me. I believe it was before this; so if that would
13 consist of research -- I do remember reading the
14 instructions that she faxed me and agreeing with her
15 that her earlier interpretation regarding the need for
16 a writing and a letter of commitment was accurate.

17 Q. But was that --

18 A. And that was the extent of whatever research
19 I did.

20 Q. Was that research done with regard to any FCC
21 definition of the term "reasonable assurance"?

22 A. I'm telling you exactly what I did. You can
23 characterize it any way you want. I looked at the
24 instructions on the FCC form, and I noted that there
25 seemed to be different requirements for financing from

1 a bank and financing from an individual, and the key
2 question was with regard to the financing from the
3 individual, as I recall, is that she had to have, I
4 believe -- I think the phrase was "at hand" a balance
5 sheet. And I was satisfied that that was, you know,
6 that was complied with.

7 Q. When did you do this research?

8 A. It wasn't the research. You keep saying
9 "research." I read the FCC instructions. That was
10 the extent.

11 Q. Forgive me. When did you read the FCC
12 instructions?

13 A. As I said, I believe it was just -- it was
14 around the time I signed the declaration. It would
15 have been -- as I'm thinking now --

16 Q. The declaration we are speaking of now?

17 A. The exhibit that is in front of me now,
18 Exhibit 3. Come to think of it, it would have been
19 before I signed this because I think this was the last
20 thing that I did.

21 Q. How much before this?

22 A. It was probably within a week or two.

23 Q. But prior to that period, you did not do any
24 research regarding the FCC definition of the term
25 "reasonable assurance" or read any instructions or

C

Appendix C

REVISED BUDGET - EL RIO FM STATION

LOREN F. SELZNICK

A. Construction Costs

1. 65' pole (including labor and materials) (power at site now)	\$4,500
2. Transmitter building	5,200
3. Transmitter (1KW--Hall Electronics)	5,500
4. Exciter (30w Energy-Onyx--Hall)	2,595
5. Antenna (2-bay, Hall Electronics) plus 200 feet of transmission line, connectors adaptor etc.	3,105
6. Remote control (Sine Systems) & EBS unit	2,060
7. Modulation monitor (Innovonics)	2,200
8. STL-8 Marti (Hall Electronics) plus two Scala antennae	3,900
9. Stereo generation/processing (Hall Electronics) AFEX Compellor/Dominator) with Innovonics stereo generator	2,300 1,100
10. Satellite dish (local) and receiver	3,000
11. Production control equipment and satellite interface equipment (The Management's DJ-Lite and PC-Pro)	10,000
12. Miscellaneous studio equipment and general office supplies (such as CD player, headphones, mikes, studio supplies)	5,000
13. Studio furniture and fixtures (assumes renovations by lessor)	10,000
14. Power generator	4,000
15. Miscellaneous labor and installation	5,000
16. Miscellaneous taxes, shipping, etc.	10,000
TOTAL CONSTRUCTION COSTS.....	\$ 79,460

B. First Three Months' Operating Costs..... \$ 30,000
(assumes no salary for Selznick, use of contract engineer
(\$125/month), \$575 monthly music service and fees,
\$1,200/month salary for newsman/production person,
\$1,000/month salary for receptionist/traffic/bookkeeper,
\$1,500/month salary (plus commissions) for salesperson,
\$125/week salary for 2 parttime employees, \$1750/month
for phone/utilities, \$1,000 monthly tower site rental,
and \$1850 for taxes, legal, fees & other miscellaneous)

TOTAL ESTIMATED COSTS.....\$ 109,460

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